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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,
Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Statement of the Case

The petition seeks review of the order of the court of appeals vacating a portion of the district court's decree prescribing the remedy for the "dual system" found to exist in Denver. The portion vacated was a pilot bilingual-bicultural program "particularly directed toward the educational problems of Mexican-American children" (380 F. Supp. at 94; App., p. 199a), at four elementary schools which were to remain sustantially (77%-88%) minority (Hispano) and at two secondary schools. As described by the court of appeals, the program ordered would:

> . . . extend to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement . . . [include] a mechanism for comprehensive monitoring of the program's status . . . [c]ontinuing evaluation by ten "Equal Educational Opportunities Committees," each composed in part of persons from outside the school system . . . [and] touch virtually every aspect of curriculum planning,

> methodology and philosophy presently the responsibility of local school authorities . . . [The plan proposed] the inclusion of specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education (beginning at age three) and adult education for minorities, and provision of adequate clothing for poor minority school children. 521 F.2d at 480; App. p. 49a, 50a.

Petitioners seek the reinstatement of this "adjunct" to the desegregation decree and further seek its implementation throughout the school system, i.e., in a fully integrated setting. (Pet. p. 46, n. 9)

Following remand from this Court, *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and after a hearing, the district court found that ethnic imbalance throughout the school district was the product of certain segregative acts in the Park Hill area in the early 1960s (368 F. Supp. at 210; App. p. 281a). The constitutional violation was limited to racial segregation of pupils.

After determining that "the Denver system is a dual system within the Supreme Court's definitions" (368 F. Supp. at 210; App., p. 282a), and after a hearing on the question of the remedy to be required, the district court made certain findings regarding the bilingual-bicultural program, known as the Cardenas Plan and addendum thereto, and ordered its implementation. 380 F. Supp. at 180, 681; App. pp. 148a, 149a; ibid. at 692, 694-696; App. pp. 189a-191a, 199a-207a; App. pp. 106a, 107a.

The district court recognized

> . . . that most of our Spanish surnamed or Mexican-American children are able to speak English and thus teaching in the Spanish language would not be necessary. 380 F. Supp. at 692; App. p. 191a.

That finding was supported, in the record, by defendant's

Exhibit YA, which showed the resuts of a survey made during the year of the trial which identified 136 pupils having Spanish as their home language as "needing intensive help." Another 115 needed "extra help." The total number of Hispano pupils in the schools that year was 20,074, in a total enrollment of 85,438 (see 521 F.2d at 483, n. 22; App. pp. 58a, 59a). The district court also found that "many" Hispano pupils were expected "to acquire normal basic learning skills which are taught through the medium of [an] unfamiliar language." 380 F. Supp. at 695; App. p. 203a.

The district court then concluded that

> Some provisions for effecting a transition of Spanish-speaking children to the English language will clearly be a necessary adjunct to this Court's desegregation plan. Id.; App. p. 203a.

and took note of this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563, (1974) holding that non-English-speaking Chinese pupils were entitled to special instruction in English under §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[1]

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[1]The district court also adverted to its earlier findings, following the first trial on the merits in 1970, (see 315 F. Supp. at 77-85, and 313 F. Supp. at 91, 96, 97) that schools with predominately minority pupil concentrations provide inferior educational opportunity. 380 F. Supp. at 682; App. p. 156a. But in these earlier findings of the district court, the inferior nature of such schools was held to be caused by ethnic concentration or isolation. 313 F. Supp. at 81, 82. (See 521 F.2d at 481 n. 17; App. 51a, 52a) The primary remedy was, accordingly, ethnic balance or desegregation. The trial judge (the same judge who heard the recent proceedings; see Pet., p. 11, n. 3) observed,

> Thus, the only hope of raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; 313 F. Supp. at 96, 97.

Compensatory education was also required in the 1970 remedy order. (The order was not implemented because the holding of violation was reversed on appeal.) But the Compensatory education ordered was directed at what the trial court had found to result from ethnic concentration, namely, low test scores and high teacher turnover. Thus, the plan called for more teacher training and support and more schooling opportunities through longer school years and early childhood programs. Classes in minority culture and language were included, but no bilingual-bicultural program was required. 313 F. Supp. at 99.

Upon these findings the district court ordered what the court of appeals called "an overhaul of the system's entire approach to education of minorities" by the implementation of the bilingual-bicultural program described above.

On appeal to the court of appeals, petitioners urged three justifications for requiring the Cardenas Plan as a part of a remedy for ethnic segregation. First, it was urged that Hispano pupils, in a desegregated setting, would be isolated in a new way — by culturally different surroundings — and that this isolation is as unconstitutional as ethnic segregation. But the court of appeals, after observing that "the equitable power to order relief . . . is limited . . . by . . . the extent of the proven constitutional violation," (521 F. Supp. at 481; App. p. 53a) noted that there were no findings that the educational program in the schools constituted illegal segregation. Ibid, at 482; App. p. 54a. The court of appeals further observed that existing programs appeared to meet the need to remove linguistic obstacles to effective desegregation. Id; App. pp. 55a, 56a. (And see Id., n. 21; App. pp. 56a)

Second, petitioners urged that the Fourteenth Amendment required an educational program adapted to the unique cultural needs of Hispano pupils. This claim was rejected by the court of appeals on the basis of this Court's decision in *San Antonio Independent School District* v. *Rodriquez*. 411 U.S. 1 (1973).

Finally, it was urged that §601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, required such a program. The court of appeals, on the basis of the facts in this case, found no violation of §601 in "failing to provide language instruction to substantial numbers of non-English-speaking children." 521 F.2d at 483, n. 22; App. p. 58a, 59a. And the court noted that even if such a violation existed, the Cardenas remedy would go beyond the scope of such a violation. Id., n. 22; App. pp. 58a, 59a.

The court of appeals did not quarrel with the district court's determination that "[s]ome provisions for effecting a transition of Spanish-speaking children to the English language" (380 F. Supp. at 695; App. p. 203a) are necessary. 521 F. 2d at 482; App. p. 54a. But the Cardenas remedy went "well beyond helping Hispano school children to reach proficiency in English necessary to learn other basic subjects" (521 F. 2d at 482; App. p. 54a) and therefore "overstep[ed] the limits of the [district court's] remedial powers." Ibid, at 981; App. p. 53a. The court of appeals accordingly remanded for the purpose of determining "the relief, if any, necessary to insure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." Ibid., at 483; App. pp. 59a, 60a.

REASONS FOR DENYING THE WRIT

I.

The Petition raises no new questions of substantial significance or importance.

A. *The Question Of Whether The Fourteenth Amendment Requires That Public Schools Provide, For Linguistic Minorities, More Than Programs Designed To Correct Deficencies In Basic English Skills Is Controlled By Previous Decisions Of This Court.*

In *San Antonio Independent School District* v. *Rodriguez, supra* (1973), this Court held that education is not a fundamental right guaranteed by the Constitution, at least where basic minimal skills necessary for the exercise of basic rights such as speech and voting are provided. But where the state undertakes to offer education, it must be made available on equal terms and without segregation on the basis of race or ethnicity. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (Brown I). In *Lau* v. *Nichols, supra,*

(1974), the school district was providing education on equal, nondiscriminatory terms. But some 1,800 of its pupils of Chinese ancestry were unable to speak or write or understand English, the basic language of instruction in the schools, and the school district was not helping them learn English. This Court held that this constituted a breach of the school system's agreement with its funding source not to discriminate on the ground of national origin contrary to §601 of the Civil Rights Act of 1964, 20 U.S.C. §2000d.

It was urged on this Court in *Lau* that failure to provide a program to meet the special needs of pupils with such severe linguistic handicaps violated the Equal Protection Clause. 414 U.S. at 566. But this Court chose, instead, to decide the case on the basis of contractual terms incorporating a requirement that affirmative steps be taken to rectify such language deficiencies.

So here, this Court should decline to review and decide the case on the basis of the Fourteenth Amendment. As in *Lau*, it had been urged in the court below that §601 of the Civil Rights Act of 1964 requires the implementation of a program to remedy educational handicaps which burden members of a linguistic minority.[2] The court of appeals, with the benefit of this Court's decision in *Lau*, found that the small number of non-English-speaking pupils in the Denver schools were receiving appropriate help in several programs directed to their needs. (521 F. 2d 482, n. 21, 483, n. 22; App. pp. 56a-59a), and that there was no violation of §601. Id., n. 22; App. pp. 58a, 59a.

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[2]No specific remedy was urged in *Lau*; the specific and comprehensive remedy urged in this case was held, by the court of appeals, to "overstep the scope of a remedy properly directed to [a §601] violation." 521 F. 2d at 438; App. p. 59a.

B. *The Renewed Claim That The Vacated Remedy Plan Was Justified By a Violation Of §601 Of The Civil Rights Act of 1964 Raises No Question Requiring The Attention Of This Court At This Time.*

Petitioners suggest (Pet. p. 96) that the court of appeals erred when it held that respondent had not violated §601 (42 U.S.C. §2000d) by failing to rectify language deficiencies (521 F. 2d at 483, n. 22; App. pp. 58a, 59a) and that "even if such a violation were supported by the record . . . the Cardenas Plan would . . . overstep the scope of a remedy properly directed to the violation." Id; App. p. 59a.

Petitioners do not claim that English language deficiencies were not being rectified, as required by the 1970 guidelines, (App. p. 320a) under §601. Rather, petitioners argue that a 1975 outline of "appropriate 'affirmative steps'" (App. p. 326a) to rectify such deficiencies, promulgated by the Department of Health, Education and Welfare in 1975, raises the statutory standard to include pupils who speak and can understand English. They then urge that such an outline or guideline, promulgated pursuant to an Act of Congress, becomes the "minimum constitutional standard" under §5 of the Fourteenth Amendment and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) at 936, n. 10, and that these claimed new standards of violation and remedy justify the Cardenas Plan. (Pet. pp. 93-101)

A major problem with this issue is that it is not fully and clearly presented. When the court of appeals determined that §601 had not been violated, it did not have before it the 1975 guidelines and did not, therefore, decide whether they were validly issued and, if so, whether they go further, as claimed, than requiring steps to rectify language deficiencies of pupils unable to speak and understand English, as previously required. Moreover, even if more is required under the 1975 guidelines, the Cardenas Plan would still appear to go far

beyond the program required by the new guidelines, and the court of appeals has not decided that issue, either.

This case is not in a posture to permit clarification of "the deference courts are to accord to HEW guidelines," even if the question is of general importance.

II

The holding of the Court of Appeals that the Cardenas Plan went beyond the nature of the constitutional violation is fully in accord with this Court's decisions and does not conflict with the decisions of any other court of appeals.

A. *The Court of Appeals Faithfully Followed this Court's Guidelines.*

In the nature of the matter, this Court, in trying to lay down guidelines for the assistance of lower courts in eliminating from the public schools all vestiges of state-imposed segregation, could only "suggest the nature of limitations" on the Court's equitable remedial powers. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), at 14, 31. This Court plainly stated, however,

> "[n]o fixed or even substantially fixed guidelines can be established as to how far a court can go, but *it must be recognized that there are limits.*" Ibid, at 28 (emphasis added)

The clearest limitation is the requirement that there be a violation. "[A]bsent a finding of a constitutional violation, [an educational policy within the discretionary power of a school board] would not be within the authority of a federal court." Ibid, at 16

But even where there is a finding of violation, "the scope of the remedy is determined by the nature and extent of the violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974), at 744.

These rules of limitation stand, of course, in tension over against other rules emphasizing the "breadth and flexibility

. . . inherent in equitable powers." *Swann, supra,* at 15. But the breadth of such powers is always subject to limits which relate back to the constitutional violation found.

In this case, the violation found was the maintenance of a dual system based entirely on official acts of pupil segregation. The basic and corresponding remedy, therefore, was desegregation of the pupils. In furtherance of pupil desegregation, teachers and staff were reassigned so as to eliminate any "earmarking effect" of a racially identifiable faculty assignment pattern. *Keyes, supra,* at 202.

There was, however, no finding by the district court that the School District's curriculum and educational methods operated to segregate pupils or stood in the way of the desegregation process. Nor was there any finding that the educational program was a product or vestige of the pupil segregation. Thus, in the absence of a constitutional violation, the court of appeals had no basis upon which to approve that part of the district court's order directing the "overhaul of the system's entire approach to education of minorities." 521 F. 2d at 480; App. p. 49a.

Even if failure to provide for the transition to English by Hispano pupils unable to speak or unfamiliar with English (380 F. Supp. at 695; App. p. 203a) constituted a separate constitutional violation, apart from pupil segregation, the court of appeals held that the Cardenas Plan was too broad in scope when measured against that possible violation. 521 F.2d at 482; App. p. 54a. (See the appellate court's description of the Cardenas Plan, 521 F. 2d at 480, 481; App. pp. 49a, 50a.)

For these reasons, the court of appeals vacated the order requiring the Cardenas Plan and remanded with directions to determine whether any relief was required for pupils lacking proficiency in English. Ibid, at 483; App. pp. 59a, 60a.

We submit that the ruling of the court of appeals in this regard is wholly in accord with this Court's guidelines in *Swann*.

B. *There is No Conflict Among the Circuit Courts, and in Particular There is No Conflict Between the Tenth Circuit and Fifth Circuit.*

Outside the Fifth Circuit the only circuit court opinion cited by petitioners (Pet. pp. 72, 73) dealing with the remedy question is *Davis* v. *School District of City of Pontiac, Inc.* 474 F. 2d 46 (6th Cir. 1973). That case deals with whether the power of a district court, where de jure segregation exists, is broad enough to cover the creation of a particular administrative post. The Court of Appeals observed that such an order is within the trial court's discretion provided it was made for the purpose of desegregating the school system. No bilingual-bicultural plan was involved in this opinion or in any other court of appeals opinions outside the Fifth Circuit cited by petitioners.

In only one case did the Court of Appeals of the Fifth Circuit approve a program for the schools similar to the Cardenas Plan as a remedy for de jure ethnic segregation. That was the *San Felipe-Del Rio* case. *United States* v. *Texas*, 466 F. 2d 518 (5th Cir. 1972). In that case a comprehensive plan earlier prepared by Dr. Cardenas for the Department of Health, Education and Welfare was proposed by the newly consolidated school district. Del Rio appealed, but the case was remanded to the District Court in contemplation of an agreed modification of the plan. But differences among the parties again arose and the District Court ordered the implementation of the original comprehensive plan. On a second appeal there was agreement between the parties that the bilingual-bicultural plan would not be contested and the School District's motion for change of venue to another district would not be opposed. The Court of Appeals granted the motion for the change of venue and affirmed the judgment as

to the remedy plan without comment. Thus, the Cardenas-type plan was not tested in the Court of Appeals in an adversary proceeding.

In no other case has the Court of Appeals for the Fifth Circuit approved a desegregation remedy similar to the Cardenas Plan.[3] To the contrary, one of the latest opinions of the Court of Appeals of the Fifth Circuit arising in Uvalde, states that the entire question of whether a bilingual-bicultural education program is necessary to permit Mexican-American students to continue and develop intellectual capacity in Spanish while gradually becoming proficient in English goes to "a matter reserved to educators." *Morales* v. *Shannon*, 516 F. 2d 411 (5th Cir. 1975), at 414, 415.

The *Uvalde* case, which was decided July 23, 1975, was remanded to the District Court with directions to implement, as a remedy for de jure ethnic segregation, the remedy outlined in *Cisneros* v. *Corpus Christi Independent School District*. 467 F. 2d 142 (5th Cir. 1972). The Court of Appeals referred specifically to pages 152-154 of the *Corpus Christi* opinion, which required, as the remedy for de jure segregation of Mexican-Americans, nothing more than the reassignment of pupils and ethnic balancing of the schools. The Court of Appeals, in the *Uvalde* case, refused to order the implementation of the bilingual-bicultural plan and remanded for further consideration on a fresh record in the event the plaintiffs wished to try to show discriminatory practices in the school district's conduct of the Texas statutory elementary school bilingual-bicultural program.

Even more recently, the Court of Appeals for the Fifth

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[3]In *Arvizu* v. *Waco Independent School District*, 495 F. 2d 499 (5th Cir. 1974), a bilingual and bicultural program was to be improved and expanded, but there is no indication in the District Court's order that the plan in Waco was as comprehensive and pervasive as the Cardenas Plan. Ibid. at pp. 1279, 1280. But more to the point, the propriety of the plan was not appealed to the Court of Appeals and was not commented upon there.

Circuit, in remanding a case for reconsideration after holding that de jure segregation of Mexican-Americans existed in New Braunfels, *Zamora* v. *New Braunfels Independent School District,* 519 F. 2d 1084 (5th Cir. 1975), added that the remedy appropriate for such a violation should be considered in the light of *Keyes, supra, United States* v. *Texas Education Agency* (*Austin*) 467 F. 2. 848 (5th Cir. 1972), and *Corpus Christi supra.* In the *Austin* case, the Court of Appeals had required "the greatest possible degree of actual desegregation" in accordance with *Swann;* bilingual instruction was mentioned only as an impermissible substitute for adequate desegregation.

Thus, it is difficult to find the "direct conflict between the Tenth and Fifth Circuits regarding the inclusion of bilingual-bicultural and compensatory education components in court-ordered desegregation plans" as asserted by petitioners (Pet. pp. 81, 82). Whatever the circumstances of the *San Felipe-Del Rio* situation, the consistent position of the Court of Appeals of the Fifth Circuit in its most recent cases is to direct a remedy which goes no further than desegregation or ethnic balance.[4] In no other circuit has a plan similar to the Cadenas Plan been approved. There is no real conflict among the circuit courts on this matter.

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[4]A difference of nomenclature exists, however, between the Fifth and Tenth Circuits. " 'Chicano' is the diminutive of 'Mejicano,' and is, therefore, quite restrictive, and can be used only when referring to Mexicans or Mexican-Americans." (Dr. Daniel Valdez in *La Luz,* June, 1972, p. 61) In Denver most Spanish origin persons come from rural New Mexico and Southern Colorado (Plaintiffs' Exhibit 20, p. 4) rather than from Mexico. Accordingly, "Hispano" is used in Denver, while Mexican-American seems to be the term most commonly used in Texas.

C. *The Court of Appeals Correctly Determined the Applicability of Federal Statutory Standards and Regulations and Guidelines Promulgated Thereunder; Its Decision in No Way Conflicts with any Decision of this Court or any other Court of Appeals Regarding the Applicability of such Standards Pertaining to Language Deficiencies of Public School Pupils.*

The petition (Pet. pp. 83-85) cites no decisions of this Court or any court of appeals using the regulations and guidelines of the Department of Health, Education and Welfare as a standard for formulating relief for a Fourteenth Amendment violation,[5] where the relief in question is a bilingual-bicultural plan such as the Cardenas Plan in this case. Accordingly, the court of appeals decision here cannot be in conflict with applicable decisions of this Court as with decisions of other courts of appeal.

As for the contention that the HEW regulations and guidelines, without reference to other decisions on the point, were not given the required weight by the court of appeals, we submit that the court expressly considered all such matters in its opinion. This contention of petitioners, like the one discussed in Part I-B, *supra*, p. 7, asserts that HEW guidelines set the standard which the courts must follow. The difference is that the other contention claims that the guidelines set both a standard for determining what the Fourteenth Amendment requires for Equal Protection and a measure of the scope of the remedy; the contention here is that the guidelines set a standard for the courts to follow in fashioning remedies.

In this case the court of appeals expressly found that the Cardenas Plan overstepped the scope of a remedy directed to a violation of §601 of the 1964 Civil Rights Act, 42 U.S.C.

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[5] *Lau, supra*, was expressly not decided on the basis of the Fourteenth Amendment.

§2000d. At the time of the decision (August 11, 1975) the court did not have before it the guidelines promulgated that summer (App. p. 324a-359a). The prior guidelines and regulations deal with pupils like those in *Lau, supra,* who are unable to speak and understand English. App. p. 320a. The court of appeals correctly held that the Cardenas Plan went far beyond rectifying such a language deficiency. 521 F. 2d at 483, n. 22; App. pp. 58a, 59a.

Petitioners claim that the new 1975 guidelines enlarge the scope of the remedy for violation of §601. Whether or not this is true, the court of appeals found that there was no violation of §601. Id; App. p. 58a, 59a. The issue raised here by petitioners is thus not reached in this case unless a new violation is established upon remand. This is not the kind of important question contemplated by Rule 19 of the Rules of this Court.

CONCLUSION

Respondents *School District No. 1, Denver, Colorado, et al,* respectfully urge that the petition for certiorari should be denied for the reasons stated above.

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